PENNSYLVANIA RAILROAD COMPANY *v.* SONMAN SHAFT COAL COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 10. Argued May 14, 1915; restored to docket for reargument June 14, 1915; reargued October 25, 1915.—Decided December 4, 1916.

The duty of a carrier to furnish cars for coal to be loaded at the mine and forwarded promptly for delivery to purchasers in other States is a duty in interstate commerce, notwithstanding the sale of the coal is f. o. b. at the mine.

If no administrative question is involved, a claim for damages for failure, upon reasonable request, to furnish to a shipper in interstate commerce cars sufficient to meet his needs may be enforced in a state as well as a federal court, and without preliminary finding by the Interstate Commerce Commission.

Such remedy is preserved by § 22 of the Interstate Commerce Act. The modes of redress provided by §§ 8 and 9 are not exclusive. *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121.

Where relevant conditions of trade and transportation are normal, it is the duty of the carrier, upon reasonable demand, to furnish a shipper in interstate commerce sufficient cars to satisfy the actual needs of his business. That duty, in this case, existed under the common law until the date of the Hepburn Act, and continued thereafter under a provision of that act which, so far as concerns this case, amounts to an adoption of the common law. Act of June 29, 1906, § 1, c. 3591, 34 Stat. 584.

It is only in times of car shortage resulting from unusual demands or other abnormal conditions, not reasonably to have been foreseen, that car distribution rules originating with the carrier can be regarded as qualifying or affecting the right of a shipper to demand and receive cars commensurate in number with his needs. *Pennsylvania R. R. Co.* v. *Puritan Coal Co., supra.*

Evidence that throughout the period covered by alleged failures to supply cars, many cars of the carrier which otherwise would have been available to shippers on the carrier's lines were on the lines of other railroad companies as the result of through routings and joint rates, has no tendency to prove that the carrier supplied the complaining shipper with the cars to which he was entitled or to mitigate its default in that regard.

241 Pa. St. 487, affirmed.

THE case is stated in the opinion.

Mr. Francis I. Gowen and *Mr. John G. Johnson,* with whom *Mr. F. D. McKenney* was on the briefs, for plaintiff in error.

Mr. A. M. Liveright and *Mr. A. L. Cole* for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

The coal company brought this action to recover damages from the railroad company upon two grounds, first, that for a period of four years, beginning April 1, 1903, the railroad company had failed to supply the coal company with a sufficient number of cars to meet the needs of the latter's coal mine; and, second, that during the same period the railroad company, in furnishing cars to the several mines in that district, had discriminated unjustly against the coal company and in favor of some of its competitors. The second ground was eliminated by the coal company at the trial and does not require further notice. The action was begun in a state court and resulted in a

judgment for the coal company for $145,830.25, which the Supreme Court of the State affirmed. 241 Pa. St. 487.

The questions presented by the several assignments of error are: (1) What was the nature of the commerce involved? (2) If the commerce was interstate, was the action cognizable in a state court? (3) Was prejudicial error committed in excluding evidence presently to be mentioned?

The coal company sold its coal f. o. b. cars at the mine, and when the cars were loaded the coal was promptly forwarded to the purchasers at points within and without the State—largely to points in other States. This was well understood by both companies—by the coal company when it asked for cars and by the railroad company when it supplied them. Cars were not requested or furnished merely to be used in holding or storing coal, but always to be employed in its immediate transportation. While furnishing some cars for this service, the railroad company failed to furnish as many as the coal company needed and requested. It is plain that supplying the requisite cars was an essential step in the intended movement of the coal and a part of the commerce—whether interstate or intrastate—to which that movement belonged. It was expressly so held in *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, 465–468. We there said of the sale and delivery of coal f. o. b. at the mine for transportation to purchasers in other States: "The movement thus initiated is an interstate movement and the facilities required are facilities of interstate commerce." Here the state court ruled that, as the coal was sold f. o. b. at the mine, the commerce involved was intrastate, even though the coal was going to purchasers outside the State. This was error, but it plainly was without prejudice unless it led the state court to exercise a jurisdiction which it did not possess.

In the courts below the railroad company contended that, in so far as the commerce involved was interstate,

the action could not be entertained by a state court consistently with the Interstate Commerce Act, c. 104, 24 Stat. 379; and that contention is renewed here. It proceeds upon the theory, first, that the coal company was without any right to redress in respect of its interstate business unless the failure to supply it with the requisite cars was a violation of some provision of that act; second, that §§ 8 and 9 of the act prescribe the only modes of obtaining redress for violations of its provisions, and, third, that an action for damages in a state court is not among the modes prescribed.

It is true that §§ 8 and 9 deal with the redress of injuries resulting from violations of the act and give the person injured a right either to make complaint to the Interstate Commerce Commission or to bring an action for damages in a federal court, but not to do both. If the act said nothing more on the subject it well may be that no action for damages resulting from a violation of the act could be entertained by a state court. But the act shows that §§ 8 and 9 did not completely express the will of Congress as respects the injuries for which redress may be had or the modes in which it may be obtained, for § 22 contains this important provision: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." The three sections, if broadly construed, are not altogether harmonious, and yet it evidently is intended that all shall be operative. Only by reading them together and in connection with the act as a whole can the real purpose of each be seen. They often have been considered and what they mean has become pretty well settled. Thus we have held that a manifest purpose of the provision in § 22 is to make it plain that such "appropriate common law or statutory remedies" as can be enforced consistently with the scheme and purpose of the act are not abrogated or

displaced, *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446–447; that this provision is not intended to nullify other parts of the act, or to defeat rights or remedies given by earlier sections, but to preserve all existing rights not inconsistent with those which the act creates, *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 129; that the act does not supersede the jurisdiction of state courts in any case, new or old, where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission, or relate to a subject as to which the jurisdiction of the federal courts is otherwise made exclusive, *ibid.* 130; that claims for damages arising out of the application, in interstate commerce, of rules for distributing cars in times of shortage, call for the exercise of the administrative authority of the Commission where the rule is assailed as unjustly discriminatory, but where the assault is not against the rule but against its unequal and discriminatory application, no administrative question is presented and the claim may be prosecuted in either a federal or a state court without any precedent action by the Commission, *ibid.* 131–132; and that, if no administrative question be involved, as well may be the case, a claim for damages for failing upon reasonable request to furnish to a shipper in interstate commerce a sufficient number of cars to satisfy his needs, may be enforced in either a federal or a state court without any preliminary finding by the Commission, and this whether the carrier's default was a violation of its common law duty existing prior to the Hepburn Act of 1906, or of the duty prescribed by that act,[1] *ibid.* 132–135; *Eastern Ry. Co.* v. *Littlefield*, 237 U. S. 140, 143; *Illinois Central R. R. Co.* v. *Mulberry*

[1] "SEC. 1. . . . and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, . . . ; and it shall be the duty of every carrier subject

Hill Coal Co., 238 U. S. 275, 283; *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, 472.

Applying these rulings to the case in hand, we are of opinion that a state court could entertain the action consistently with the Interstate Commerce Act. Not only does the provision in § 22 make strongly for this conclusion, but a survey of the scheme of the act and of what it is intended to accomplish discloses no real support for the opposing view. With the charge of unjust discrimination eliminated, the ground upon which a recovery was sought was that for a period of four years, during which the conditions were normal, the carrier had failed upon reasonable demand to supply to a shipper in interstate commerce a sufficient number of cars to transport the output of the latter's coal mine. Assuming that the conditions were normal and the demand reasonable, it was the duty of the carrier to have furnished the cars. That duty arose from the common law up to the date of the amendatory statute of 1906, known as the Hepburn Act, and thereafter from a provision in that act which, for present purposes, may be regarded as merely adopting the common law rule. There was evidence tending to show, and the jury found, that the conditions in the coal trade were normal and the demand for the cars reasonable. Indeed, without objection from the carrier, the court said when charging the jury: "There is no testimony disputing the claim of the plaintiff that these were normal times." The carrier insisted and the jury found that the carrier had a generally ample car supply for the needs of the coal traffic under normal conditions, and the jury further found that the failure to furnish the cars demanded was without justifiable excuse. Thus far it is apparent that no administrative question was involved—nothing which the act intends shall be passed upon by the

to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, . . . " c. 3591, 34 Stat. 584.

Commission either to the exclusion of the courts or as a necessary condition to judicial action.

But there was testimony tending to show that the carrier was applying or following a rule for allotting cars which did not entitle the coal company to receive as many cars as it needed and requested, and because of this it is contended that the reasonableness of this rule was in issue and was an administrative question which the act intends that the Commission shall solve. We cannot accede to the contention. The conditions in the coal trade being normal, as just shown, the number of cars to which the coal company was entitled was to be measured by its reasonable requests based upon its actual needs. It is only in times of car shortage resulting from unusual demands or other abnormal conditions, not reasonably to have been foreseen, that car distribution rules originating with the carrier can be regarded as qualifying or affecting the right of a shipper to demand and receive cars commensurate in number with his needs. *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 133. Such a rule being inapplicable in the conditions existing at the time, the rule mentioned in the testimony could not be a factor in the decision of the case, and whether in a time of unforeseen car shortage it would be reasonable or otherwise was not then material.

Upon the trial the carrier offered to prove by a witness then under examination . . . "that during all of the period of this action the defendant had in effect . . . through routes and joint rates to points outside the State of Pennsylvania on the lines of other common carriers; that it was obliged to permit cars loaded by its shippers with bituminous coal consigned to such points outside the State of Pennsylvania to go through to destination, even when on the lines of other railroad companies; that as a result of doing this it had continuously throughout the period of this action a large number of cars off its own lines

and on the lines of other common carriers, which cars would otherwise have been available for shippers of coal on the railroad lines of the defendant and these cars if not on other railroad lines would have increased the equipment available for distribution to the plaintiff's mine and would consequently have diminished the damage which plaintiff claims to have sustained by reason of the fact that it did not receive more cars than it did receive."

But on the coal company's objection the evidence was excluded. We think the ruling was right. The offer did not point to any unusual or abnormal condition, not reasonably to have been foreseen, but, on the contrary, to a situation which was described as continuous throughout the four year period to which the action relates. It did not indicate that this condition was even peculiar to that period, or was caused by an extraordinary volume of coal traffic or an unusual detention of cars on other lines of railroad, or that it was other than a normal incident of the coal transportation in which the carrier was engaged. Without doubt the cars of this carrier when loaded with coal often went forward to destinations on the lines of other carriers. It is common knowledge that coal transportation has been conducted quite generally in this way for many years. Besides, a carrier extensively engaged in such transportation from mines along its lines, as this one was, naturally would expect to have a considerable number of cars on other lines in the ordinary course of business. Although possibly having a bearing upon the adequacy of the supply of cars provided by the carrier for the coal business as a whole,—a matter not within the contemplation of the offer,—it is certain that what was proposed to be proved had no tendency to show that the carrier had supplied to the coal company the number of cars to which it was entitled or to mitigate the carrier's default in that regard.

Judgment affirmed.

PENNSYLVANIA RAILROAD COMPANY *v.* STINEMAN COAL MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 11. Argued May 14, 1915; restored to docket for reargument June 14, 1915; reargued October 25, 1915.—Decided December 18, 1916.

An action against an interstate carrier for damages caused by unfair and discriminatory departures from a rule of car distribution in times of car shortage may be prosecuted in a state court. *Pennsylvania R. R. Co.* v. *Sonman Shaft Coal Co., ante,* 120.

The rule of car distribution relied on by the plaintiff having been held discriminatory and illegal by the Interstate Commerce Commission, in due proceedings, at the complaint of other shippers, and this being proven by reports and orders of the Commission produced in evidence, *held,* that the administrative question, so determined, could not be revived by the carrier to oust the jurisdiction of the court.

By such proceedings of the Commission the Act to Regulate Commerce intends no less to redress past discriminations than prevent them in future, under the carrier's rule, and this for the benefit of all shippers who have been or may be affected thereby; and when the Commission finds the rule obnoxious, not because of temporary or changeable conditions, but inherently and from its adoption, and, be-

sides ordering its discontinuance, recognizes that all injured shippers are entitled to reparation and awards it to such as appear and prove damages, the status of the rule is fixed for past as well as future transactions under it.

Where a rule is found discriminatory by the Commission in the circumstances indicated in the last preceding paragraph, a shipper, though not a party before the Commission, cannot recover from the carrier for its failures to obey the rule before the finding was made.

241 Pa. St. 509, reversed.

THE case is stated in the opinion.

Mr. Francis I. Gowen and *Mr. John G. Johnson*, with whom *Mr. F. D. McKenney* was on the brief, for plaintiff in error.

Mr. A. M. Liveright and *Mr. A. L. Cole* for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

In a state court in Pennsylvania the coal company recovered a judgment against the railroad company for damages resulting, as was claimed, from unjust discrimination practiced in the distribution of coal cars in times of car shortage; and the Supreme Court of the State affirmed the judgment. 241 Pa. St. 509.

The suit related to both intrastate and interstate commerce, and whether, in respect of the latter, it could be brought in a state court consistently with the Interstate Commerce Act is the first question presented.

The coal company was engaged in coal mining on the carrier's line in Pennsylvania and was shipping the coal to points in that and other States. Other coal companies were engaged in like operations in the same district. A

rule of the carrier provided for a *pro rata* distribution of the available supply of coal cars in times of car shortage, but did not require or contemplate that individual cars, owned or controlled by the shipper, should be charged against his distributive share. Without questioning the reasonableness of this rule, but, on the contrary, assuming that it was unobjectionable and became the true measure of the shipper's right and the carrier's duty, the coal company claimed that the carrier had unjustly discriminated against it to its damage by furnishing it a smaller number of cars, and some of its competitors a greater number, than the rule contemplated or permitted. In other words, the claim was, not that the rule was discriminatory, but that it was violated or unequally enforced by the carrier. Of such a suit we said in *Pennsylvania R. R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121, 131–132, where the provisions of the Interstate Commerce Act were extensively considered: "There is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal courts." Adhering to this view, we think the suit was properly brought in a state court. See *Pennsylvania R. R. Co.* v. *Sonman Shaft Coal Co.*, *ante*, 120.

But it is suggested that in the course of the trial an administrative question—one which the act intends the Interstate Commerce Commission shall solve—was brought into the suit and that this disabled the court from proceeding to a decision upon the merits. The suggestion is grounded upon the fact that one of the carrier's defenses at the trial was to the effect that the rule invoked by the coal company as fixing its quota of the cars was unjustly discriminatory and therefore not an appropriate test of the shipper's right or the carrier's duty. We think the

suggestion is not well taken. The administrative question, which was whether the rule was reasonable or otherwise, was not then an open one. It had been theretofore determined in the mode contemplated by the act. Upon the complaint of other shippers, and after a full hearing, the Commission had found that the rule was unjustly discriminatory and had directed the carrier to give no further effect to it. See 19 I. C. C. 356, 392; 23 *ibid.* 186. This was shown by the reports and orders of the Commission, which were produced in evidence. Thus there was no jurisdictional obstacle at this point.

The Commission deemed it essential to a fair distribution in times of car shortage that individual cars, owned or controlled by the shipper, should be charged against his distributive share, and because the rule here took no account of such cars the Commission found that it was unjustly discriminatory. This occurred two years before the trial but after the period covered by the suit. As part of its defense the carrier claimed that the cars distributed to the coal company during that period included many individual cars controlled by the latter and that these were not charged against its distributive share. Evidently intending to recognize that this was so, and desiring to shorten the trial, the parties agreed that a verdict should be taken for the coal company in a designated sum, subject to the condition, among others, that, "if under the practice, the law and the rules," the court should conclude that "the plaintiff company should have been charged with individual cars," then judgment should be entered for the carrier *non obstante veredicto*. The verdict was taken and judgment entered thereon, the court concluding that the rule should be respected notwithstanding the Commission's finding. Complaint is made of this decision and we think it was wrong. That this shipper was not a party to the proceeding before the Commission hardly needs notice, no point being made of it in

the briefs. And it is not a valid objection that the finding came after the period to which the suit relates. The act contemplated that the proceeding should be conducted in the interest of all the shippers who had been, or were likely to be, affected by the rule, and not merely in the interest of those who filed the complaint. The purpose was to determine the character of the rule for the equal benefit of all, to the end not only that discrimination thereunder in the future might be prevented, but also that such discrimination in the past might be redressed. So understanding the act, the Commission, upon finding the rule unjustly discriminatory, ordered the carrier to cease giving effect to it and also recognized that shippers who had been injured through its operation in the past were entitled to reparation. And the Commission proceeded to award reparation to such shippers as appeared and adequately proved their injury and the amount of damages sustained. Not only so, but the Commission's report makes it plain that the finding was not based upon any temporary or changeable condition existing at the time but upon what inhered in the rule and therefore was true from the time of its adoption. The legal propriety of the Commission's finding is not questioned, but only that it operates to discredit the carrier's rule as respects earlier transactions.

In the circumstances stated we are of opinion that effect must be given to the Commission's finding, even though it came after the transactions in question, and that a recovery by the coal company cannot be permitted without departing from the uniformity and equality of treatment which the act is intended to secure. Only through an enforcement of the discriminatory rule, and of the particular feature which made it discriminatory, can a recovery be had. A right to recover independently of that is neither shown nor claimed. In short, the coal company concedes that it received all the cars to which it would have been entitled under a reasonable rule and yet seeks to recover

upon the ground that more cars were not delivered to it under a rule which was unreasonable, because unduly discriminatory in its favor. Consistently with the act this cannot be done.

Judgment reversed.